

United States District Court Southern District of Texas

Case Number: H-04-2387

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part III of IV

☒ Exhibit(s) number(s) / letter(s) # 102

Other: Pltiff's First Amended Petition
Habeas Corpus

18 IAD office in that they have almost an independent group, but
19 all people with law enforcement backgrounds. So they bring to
20 the job the orientation as a law enforcement officer of many,
21 many years standing. However, they are quartered in the same
22 facility in which they investigate. It doesn't take very long
23 if you are identified with those people that they work with
24 every day, that they have coffee with every day, many cases
25 where they live close to in the community.

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1 So what we find, then, is that IAD, good solid law
2 enforcement officers, given a responsibility which is difficult
3 for them, which they didn't enjoy or appreciate doing when they
4 were in police work, coming into the correctional arena and
5 having the same kind of responsibility, but also having a
6 responsibility for criminal investigations. And I found that in
7 talking to the few IADs that I was allowed to talk to, that they
8 shared with me that they thoroughly enjoyed doing criminal
9 investigations and they felt that having to do use of force
10 investigations was a very difficult and unrewarding chore.

11 The last area that I would just like to touch on
12 briefly has to do with what happens if -- if there is a decision
13 made that undue or excessive force was used. Now,
14 unfortunately, I have to share with the Court that the data that
15 I was provided is so mixed and so different and only as they're
16 beginning to become more sophisticated in their data gathering
17 are we going to get accurate information. But one thing that

18 seems to be constant over the last three or four years is that
19 the number or percentage of cases that are sustained by the IAD,
20 that means the cases which they find themselves that there was
21 excessive force used, runs somewhere around seven percent.

22 Now, what would be an appropriate figure? I can't
23 really answer, but I would certainly feel concerned that if in a
24 court of law that only seven percent of the people were found
25 not guilty that came before the bar, and that's exactly what's

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1 happening in Texas at this time.

2 Of 2,619 cases that were presented to me that I

3 reviewed, there were only 188 that were sustained as being

4 excessive uses of force.

5 Q. Were those also sustained as excessive uses of force or

6 were some of those sustained as technical violations of the use

7 of force procedures, such as cameras --

8 A. No. These are just excessive use of force. I took one

9 unit while I was still allowed to talk to IADs openly and they

10 felt comfortable about doing it, and that was the Eastham Unit.

11 In 1997, the IAD opened 70 cases. They sustained only two.

12 I think even more important in terms of this is that

13 staff believe that policies are important if the policies are

14 enforced by some sanction if you violate them. So I took a look

15 at all the administrative sustained cases that occurred between

16 January '98 and July 31st, '98, and there were 172 cases. 48 of

17 them were for excessive use of force. The others were for not

18 properly making out records, not properly operating the camera,
19 et cetera. Of the 48 cases in which the IAD said that there was
20 justifiable data, facts to sustain the case, this is what
21 happened. Three of them were reprimanded. 17 were given
22 probation. 14 were given probation and several days'
23 suspension. Only three were terminated, seven resigned, and
24 nobody knows what happened to four of them.

25 Now, that isn't the whole picture, because the warden,

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1 as I indicated initially, has the authority to give whatever
2 discipline he wanted even before it goes to IAD. So I took a
3 look at the same period of time to see what the wardens were
4 doing themselves before they had an IAD sustained case. There
5 were a total of -- I have to give it to you in another way, I'm
6 sorry. There were 75 cases during that period in which the
7 officer was found guilty of not accurately reporting, not
8 writing the report according to procedures. There were 20 cases
9 where a camera person didn't properly operate the camera. There
10 were 151 cases in which there was excessive use of force. Now,
11 once again, the warden has found excessive use of force. What
12 did he do? In 29 cases, he issued a reprimand. In 65 cases, he
13 gave them probation. In 14 cases, there were no records and we
14 don't know what happened to them. In 29 cases, he gave them
15 probation and a short suspension. 12 cases were allowed to
16 resign. In two cases, they resigned, were not to be hired again
17 by the department.

18 My conclusion of this process, then, is that although
19 there is an excellent paper process, for a number of reasons
20 that process is not carried out, and consequently the facts are
21 not brought to the decision maker's attention. When the facts
22 aren't brought to the decision maker's attention adequately,
23 concretely, then the punishment is so limited that the word is
24 that it really isn't all that serious.

25 MS. BRORBY: May I approach the witness, Your Honor?

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1 THE COURT: Yes.

2 MS. BRORBY: May I approach the witness?

3 THE COURT: Yes, you may.

4 BY MS. BRORBY:

5 Q. Mr. Breed, I just handed you what have been marked as
6 Plaintiffs' Exhibits 18 and Exhibit 24. Do you see those in
7 front of you?

8 A. Yes, I do.

9 Q. Are those the documents that were provided by the TDCJ from
10 which you made the calculations about the discipline that was
11 imposed on officers in use of force situations?

12 A. Yes, they were.

13 MS. BRORBY: At this time, Your Honor, I'd move
14 Exhibits 18 and 24 into evidence.

15 MR. ANASTASIADIS: No objection, Your Honor.

16 THE COURT: They're admitted.

17 THE MARSHAL: I'm sorry, what is your name, sir?

18 MR. ANASTASIADIS: Let me write that down for you.

19 BY MS. BRORBY:

20 Q. Mr. Breed, the nature and the extent of the use of force
21 that you have been describing in court today, did that become
22 obvious to you in the two or three or four days that you spent
23 on a unit from the activities that you conducted, including
24 walking runs, talking to people, and looking at use of force
25 reports and other unit records?

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1 A. Yes, it was.

2 Q. Does that -- what kind of risk of harm to prisoners does
3 that kind of regular excessive force pose?

4 A. Well, it poses it in two ways. One is as examples that
5 I've given, and there is many, many more. Inmates are
6 needlessly injured. But secondly, it creates a climate which is
7 both difficult for inmates and equally difficult for staff. I
8 have never at any time inferred that all correctional officers
9 in the Texas Department of Corrections are brutal, sadistic
10 individuals. However, it only takes a few on each unit to
11 contaminate a climate environment and destroy the trust between
12 correctional officer and inmate. And that's far more dangerous
13 when inmates see other inmates being hurt, physically injured
14 needlessly. Then they lose all confidence in the responsible
15 actions of correctional officers.

16 Q. What does it do to other officers who see that kind of
17 physical abuse that they know is against the rules?

18 A. Restate the question, please.

19 Q. What effect does it have on other officers who see that
20 kind of physical brutality that is against the rules but seems
21 to be going on?

22 A. Well, it does two things. One is that it in some,
23 particularly the younger officers, mind, it makes them -- as I
24 indicated earlier, that this is appropriate. This is perhaps
25 the way I am going to have to do if I see myself as being

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1 successful, and then therefore hopefully promoted. But, once
2 again, it's far more insidious in terms of correctional officers
3 who really want to treat inmates fairly to have the climate
4 poisoned by the few that insist on using force. And as long as
5 that force isn't stamped out in every conceivable way that
6 management can do, it's going to continue.

7 Q. Do you see the steps that TDCJ has been taking to address
8 the use of force issue as being in any way reasonable or
9 responsible, given the level of the problem that exists?

10 A. Unfortunately, I don't. Some ways perhaps they've got a
11 burden that I am aware of but maybe not as sensitive to as those
12 that have to actually operate a system as huge and difficult as
13 this one. I'm very sensitive to that.

14 But I think that as long as there are totally
15 inadequate numbers of classification staff, as long as managers
16 and supervisors are not carrying out investigations that are
17 necessary, and as long as administrators are not reviewing the

18 facts and aggressively trying to get to the truth, as long as
19 staff penalties are as lenient as they currently are, as long as
20 there isn't adequate training regarding how you deal with
21 intervention in a nonaggressive way, until such time as I see
22 wardens and managers of all levels walking those tiers, talking
23 to inmates, and finding out what is happening in their units,
24 correctional officers, some of which are going to do it in
25 illegal ways.

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1 Q. The other area that you focused a great deal of your time
2 on during your investigation in TDCJ was TDCJ's handling of
3 prisoners who perceived themselves to be at risk of being
4 physically injured by other prisoners; is that correct?

5 A. That's correct.

6 Q. A prison -- a prison system is not responsible, is it, to
7 protect every prisoner from every possible harm at the hands of
8 another prisoner?

9 A. It would be an ideal society if we could formulate it in a
10 way that would give that guarantee. I do believe, however, that
11 corrections has an absolute responsibility to provide reasonable
12 safety for all inmates.

13 Q. What kinds of inmates are the natural victims in a
14 correctional setting?

15 A. Well, certainly the small, the weak. Another category that
16 I'm more and more familiar with, and that's the elder, the
17 older, the gay, the mentally ill.

18 THE COURT: The what?

19 THE WITNESS: Mentally ill. The handicapped, the
20 ex-gang member who really wants to operate outside the gang.
21 But there is forming in Texas more and more, and this phenomena
22 actually exists in only a handful of states around the country,
23 and that is a very active gang activity which constantly looks
24 for new recruits. So beyond the weak and the vulnerable that
25 I've already identified, almost any inmate coming into

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1 corrections today is going to be faced with one of the major
2 gang groups to ride with them. And I said I don't like to use
3 the inmate language, but it's the only one that is understood
4 fully by all. The inmate is either willing to pay for
5 protection or provide sexual pleasure for protection. And this
6 is a phenomena that is of just the recent years to add to the
7 victim list.

8 BY MS. BRORBY:

9 Q. So the presence of gangs increase the level of
10 victimization in a prison?

11 A. Oh, yes, no question.

12 Q. Even without gangs, the stronger try to make the weaker
13 give them what they want; is that right?

14 A. Yes.

15 Q. Child molesters are at risk in a prison; is that right?

16 A. Yes.

17 Q. And youthful offenders are at risk in a prison?

18 A. Yes.

19 Q. Can you run a prison system without having these kinds of
20 vulnerable prisoners in your population?

21 A. Any -- any large system has to recognize that there is a
22 sizeable number of inmates which we have both now identified
23 that are going to need a protective setting even from the
24 beginning.

25 Q. Is this something that everybody in corrections knows?

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1 A. It's something that everybody in corrections recognizes and
2 is certainly working towards. I would suggest as an example
3 that across the country, somewhere between two and a half and
4 three percent of the total population is identified as
5 protective custody needing. These are people that have to be
6 placed in a situation where they are not in contact with the
7 general population at all. Two and a half percent in Texas
8 would be several thousand. At the present time in protective
9 custody, there is less than 60. Let me make another --

10 Q. Let me back you up a minute. I hate to -- I hate to
11 interrupt. But when we're talking about the national figure of
12 two and a half to three percent who need to be in protective
13 custody that is isolated from the general population, is it also
14 true nationally that prison systems will have additional beds
15 beyond that two and a half and three percent that are in some
16 way designated for the weaker offenders who maybe don't need to
17 be totally separated from the general population, but they're

18 recognized as being in the category that's more vulnerable, and

19 they tend to be housed together so they don't victimize each

20 other?

21 A. The use of safekeeping in Texas is almost a phenomena that

22 doesn't exist anywhere else in the country.

23 Q. Is there a soft line in California?

24 A. I think there's a difference between a soft line and

25 safekeeping. A soft line would be a prison, a major part of a

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1 prison.

2 THE COURT: You're saying S-O-F-T, soft line?

3 THE WITNESS: Yes, soft.

4 THE COURT: I haven't heard it before.

5 THE WITNESS: Once again, that's a term that counsel
6 has shared with us.

7 BY MS. BRORBY:

8 Q. A soft line is for softies, right, the people who aren't as
9 tough as all the other guys?

10 A. Yeah. What you normally do through classification is try
11 to separate out the -- first, the predators from the vulnerable.
12 Having once identified people as vulnerable, there's obviously
13 varying levels of vulnerability, some of which that are at the
14 top or the bottom of that list, however you want to look at it,
15 would -- should go immediately into protective custody where
16 there's total separation. Others, depending upon their
17 particular background, their particular security and program

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18 needs, would be put in institutions where there are not the
19 aggressive, acting out, predator types, and then observed very
20 closely to see whether or not they can survive in that kind of
21 situation.

22 The cue is that at the first time you see that the
23 vulnerable is being abused, then you have to make a decision
24 about moving them to a place in which he has greater protection
25 - not just transfer him to another facility identical to which

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1 he left, but one that has greater protection. You go through
2 that process until eventually you recognize that there's a
3 sizeable number that have to be provided total protection for
4 their survival. Let me --

5 Q. So when you talk about transferring a prisoner to a greater
6 level of protection, are you envisioning a situation where you
7 might have a prisoner in a true general population and then move
8 him to what I use slang to call a soft line because he's not
9 making it in the general population?

10 A. That would certainly be one of the options that you would
11 have available to you. And there's --

12 Q. And then if that prisoner was not making it on the soft
13 line, you might decide that you need to move him to a protective
14 custody situation where he's truly segregated from a general
15 population. Is that the model that you're speaking of?

16 A. If you believe in trying to protect human beings in a very,
17 very difficult environment, you have to do it that way.

18 Now, let me just make one comment, though, before we
19 go on in this area, because I think that this is something that
20 Texas folks really need to think through pretty carefully. I
21 picked up an attitude of sort of tolerating the problems of the
22 weak and the vulnerable, and particularly this seemed to exist
23 where inmates had demonstrated any kind of sexual identification
24 around a homosexual bend.

25 There's an old saying that I remember back from my

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1 Marine Corps days when somebody complained about the hard life.
2 You'd say, It's hard, but it's fair. You had a good home. You
3 wouldn't stay there. The only difference is that these
4 vulnerable people get into an institution. Maybe they had a
5 choice about their criminal activity that got them there. But
6 once society said, You are going to be locked up, society has a
7 responsibility to be doing everything possible to provide them
8 safety.

9 In Texas in talking to correctional officers, even in
10 talking to some wardens and deputy wardens, one warden told me
11 with a great deal of pride that there was no protective custody
12 on his unit. There's really a feeling that in some ways,
13 protective custody and the kinds of people that are put in
14 protective custody is a stigma on the manliness of the
15 institution that those people want to run. So I think there's
16 almost an attitudinal kind of thing that has to be dealt with,
17 that these people are our responsibility, and we have to do

18 everything within our power and authority to protect them.

19 Q. What, if any, observations did you make about the effect of

20 the attitude that you're describing on institutions' responses

21 to the vulnerable coming forward and asking for protection?

22 A. One of the very, very large problems is a systemwide method

23 of operating that a person is going to be turned down for

24 protective custody over and over again before any serious

25 consideration is given to it. It's generally done on the basis

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1 of insufficient evidence. But this occurs even when an inmate
2 has been beaten up, has been raped. He comes before the UCC,
3 and for whatever set of reasons they say, There isn't sufficient
4 evidence. Therefore, you'll stay in general population.

5 There's another effort which is quite understandable
6 in that any administrator manager wants to get as much
7 intelligence as he or she can about what's happening in their
8 unit. But one of the requirements, you know, to get protection
9 is that you've got to give names. By giving names, you're
10 quickly identified as a snitch. And one doesn't have to work in
11 the field of corrections to know the reputation of what happens
12 to those that are identified as snitches.

13 There seems to be, in my opinion, far too much
14 emphasis on, You've got to prove you've been hurt over and over
15 again. And secondly, You've got to give up enough names so it
16 makes it worthwhile before we'll even consider protective
17 custody, or what's called in Texas, safekeeping.

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18 And I want to say something about that, because
19 safekeeping is obviously the answer to the fact that in this
20 system there are only 60 beds. And the last time I made a count
21 on it, of the 60 PC beds, only 40 of them were filled. I would
22 think that there would not be any shortage of candidates for
23 those protective custody beds, looking at the cases that I have
24 reviewed. But safekeeping is the method that Texas has chosen
25 to take care of a sizeable number of people that have indicated

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1 that they need protection.

2 Some of the problems that really concern me about
3 safekeeping is, one, many of the doors, cell doors can be
4 popped. Now, I realize that there's no such thing as always
5 guaranteeing that a door can be locked, but I don't know that
6 I've been in particularly new institutions where so many cases
7 of doors being popped occur. When a door is popped, that means
8 somebody gets out and somebody gets in. Tragically, in most
9 cases somebody gets in, and then the attack takes place.

10 Second -- and this particularly occurs on medium and
11 closed units, and I saw it over and over again -- inmate up on
12 the second tier yells to the picket and say, Open up. So the
13 officer opens the door. That officer hasn't the slightest idea
14 whether that inmate belongs in that door or not. Another
15 opportunity to get at somebody very easily.

16 The response might well be, well, correctional
17 officers know all their inmates. They know which cell they're

18 in. No. Texas has a system of rotating their officers around
19 so that generally speaking, every day they're on a different
20 unit. They haven't the slightest idea who the officers -- I
21 mean, who the inmates are, who the vulnerable, who the predators
22 are. Very often, they aren't even given that kind of
23 information before they come on duty if they don't look at their
24 log. So they might well open all the cell doors to go to chow
25 when there is three that are in there who are predators that are

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1 locked down on purpose.

2 I could go into great deal about this, but what I'm
3 trying to indicate is that safekeeping isn't very often safe,
4 particularly when officers aren't walking those tiers, when
5 officers aren't checking on an every shift basis to see whether
6 there's any lubricant in the locks, whether there's any paper in
7 the locks so that doors can't be popped.

8 I think the most difficult part, however, about
9 safekeeping is that safekeeping will go out into the fields and
10 be working right alongside a group of general population people
11 where their enemies might well be. They come back from the
12 fields and they go into a shower at the same time the general
13 population inmates. With the exception of close custody, now,
14 they will go into the same dining hall. So what I'm suggesting
15 to you is that safekeeping is not safe in Texas as it's
16 currently operating.

17 Q. If I've understood you correctly, safekeeping is Texas'

18 version of protective custody. Safekeeping you see as the TDCJ

19 version of protective custody?

20 A. Safekeeping as it's used in Texas has no relationship

21 whatsoever to protective custody as found in large correctional

22 agencies across the country.

23 Q. But except for 60 or 100 beds, it's the most protective

24 custody that is available to the vulnerable prisoners in Texas

25 if they can get into it?

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1 A. Yes and no.

2 Q. Okay.

3 A. Administrative segregation has become the place to where
4 people that are vulnerable really feel their life is in danger
5 will try to get. Even as I visited each institution and talked
6 to the folks about their administrative segregation, a question
7 I'd always ask is: Do you have any protective custody? No.
8 Protective custody don't come to this facility. Protective
9 custody are not allowed in our administrative segregation. I
10 found many people who would qualify under anybody's
11 classification as needing protective custody in administrative
12 seg. However, the unfortunate part -- and this is where I would
13 hope that administration and management would very, very
14 carefully assess what they're doing. Inmates have learned they
15 can get to administrative segregation by breaking the rules.
16 And so they refuse to work. They refuse housing. They do it
17 because they know they can get to administrative segregation and

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18 they will be safer there, at least safe from other inmates.

19 Q. What do you think of that as a method of providing
20 protection to the vulnerable prisoners in a prison population?

21 A. I'd rather see that happen than have them left in general
22 population or placed in safekeeping, which is not, at least at
23 the time I reviewed it, truly a safekeeping situation. I think
24 it's unfortunate that anybody has to break serious rules in
25 order to get protective custody, then be placed in an

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1 administrative segregation kind of environment which is sterile,
2 rigid, and has nothing going for it in terms of helping inmates
3 become nonoffenders.

4 Q. Does it have an adverse impact on the amount of time a
5 prisoner will spend in prison when he chooses to go to
6 administrative segregation or cell restriction as a means of
7 gaining protection?

8 A. Would you repeat the question? I want to be sure I answer
9 it.

10 Q. Does it have any impact on a vulnerable prisoner's time
11 that he's going to serve in prison if he chooses to obtain
12 protection by getting serious disciplinary offenses and going to
13 administrative segregation or cell restriction?

14 A. Well, there's no question that it does, because, first,
15 generally speaking, to get an administrative segregation, even
16 though they have chosen to break a rule to get there, like
17 refusing to work or refusing housing, they'll probably lose all

18 their good time. Not just lose all of their good time, but in
19 some cases this is hundreds and hundreds of days. If somebody
20 would compute that time to some legislators, I'm certain they
21 would be terribly upset about the cost that's being ensued in
22 order to take away people's good time and keep them in prison
23 longer.

24 However, in getting to administrative segregation,
25 they have no opportunity to get good time. They have no

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1 opportunity to get any kind of programming that may be helpful
2 to them upon release to society. So it's a lose-lose situation,
3 with the one caveat, and that is that for the first time, the
4 inmate feels safe.

5 Q. Did you observe any systemic causes for a level of
6 victimization that you found in Texas besides the natural
7 presence of victims in the population who were not in protective
8 custody?

9 A. Well, there's no question that if you're going to leave
10 vulnerable people where predators are present, there's going to
11 be more attacks, assaults, rapes, et cetera. It's difficult for
12 me to understand.

13 And earlier you asked me a question that in other
14 facilities, can't you place some of these vulnerable people in a
15 situation where they can be safer and yet not have the rigidity
16 of an ad seg or even a protective custody? And it's true, if
17 you operate an effective classification system, that will assure

18 you reasonably that by putting this group of vulnerables
19 together that, in most cases, they can live compatibly. And
20 they can, and that's done throughout this country.

21 Q. Is that something like what safekeeping is supposed to be?

22 A. Well, it could be a piece of what safekeeping is, but these
23 vulnerable people, then, aren't put out where they're in contact
24 with the general population.

25 Q. And then for the vulnerable people who are too vulnerable

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1 to make it in that setting, there would be a protective custody
2 for them to go to?

3 A. Yes.

4 Q. Did you observe any other conditions in the TDCJ that
5 facilitated victimization?

6 A. One of -- one of -- one other factor about protective
7 custody -- and I really can't speak except in the limited
8 numbers that they have. But in safekeeping, people are put in
9 safekeeping finally because they have almost exhausted the whole
10 process of life endangerment, I-60 memorandums, grievances, over
11 and over again until in some cases they finally get into
12 safekeeping.

13 Once in safekeeping, if they break rules -- this
14 doesn't have anything to do now with rules of why they were
15 brought into safekeeping, but other kinds of rules -- they will
16 be first threatened that if you don't straighten up your act,
17 you're going to be taken off of safekeeping.

18 But, secondly, case after case after case that I
19 reviewed and that I have records on, people broke rules, and
20 then the UCC removed them from safekeeping and put them back in
21 the general population because they had broken rules. They get
22 back in the general population, they're assaulted again, they're
23 raped again.

24 I would suggest that people that break rules should be
25 disciplined just like somebody in general population is. But if

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1 you have classified and stated that an inmate needs protection,
2 you don't take that protection away if you're carrying out your
3 responsibility of protecting inmates.

4 Q. That's not a fair discipline for a wrongdoing?

5 A. Absolutely not.

6 Q. Do you see the lack of any classification counselors or
7 substitute, therefore, as playing any role in the problem that
8 victims face in TDCJ?

9 A. Well, I would just see back to the 1995, whenever they had
10 classification counselors, even at the level of one to 200, a
11 classification counselor being aware of these problems, being
12 very much involved with them, trying to work something through.
13 Then when the UCC says, Leave them in the general population, a
14 good classification counselor is going to speak up strongly,
15 present all the reasons why safekeeping and protective custody
16 is required.

17 And even then, if overruled by UCC, then they would